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MICHAEL RODAK, JR.

In the Supreme Court of the United States of America

October Term, 1974

No. 74-1154

W. C. WHITNEY and JOHN DOE, personal representative and Administrator of the Estate of David R. Whitney, Deceased,

Petitioners,

vs.

HERBERT R. TSOSIE and EDITH TSOSIE

Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

---

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In the Supreme Court of the United States of America

October Term, 1974

No.

W. C. WHITNEY AND JOHN DOE, PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF DAVID R. WHITNEY, DECEASED,

Petitioners,

vs.

HERBERT R. TSOSIE AND EDITH TSOSIE

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

The Petitioners, W. C. Whitney and John Doe, personal representative and administrator of the estate of David R. Whitney, deceased, pray that a writ of certiorari issue to review the order and judgement of the Court of Appeals of the State of New Mexico rendered in these proceedings on November 6, 1974.

OPINIONS BELOW

The order entered by the Court of Appeals of the State of New Mexico, affirming the verdict of the trial court without an opinion, has not been reported. This order appears at Appendix A, *infra.* p. 16.The Supreme Court of New Mexico denied the petition for certiorari on December 13, 1974. This order denying the petition for certiorari appears at Appendix B, *infra,* p. 17, and has not been reported as of this date.

JURISDICTION

The order of affirmance was entered by the Court of Appeals of the State of New Mexico on November 6, 1974. Petition for certiorari was timely sought in the State appellate courts, and the petition was denied in an order dated December 13, 1974. This petition for certiorari in the Supreme Court of the United States was filed less than 90 days after the denial of the petition for certiorari in the State court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Plaintiffs-respondents were awarded $25,500.00 in a personal injury jury trial. Defendant-petitioner appealed pursuant to the Constitution and laws of the State of New Mexico which guarantee every aggrieved person the absolute right to one appeal (New Mexico Constitution, Article VI, Section 2) and provide that appellate decisions must be in writing with the grounds for the decision stated (16-7-11 N.M.S.A. 1953 Comp.). The New Mexico Court of Appeals affirmed the lower court's judgment without an opinion, in accordance with an order of the New Mexico Supreme Court, which order was issued after the briefs had been filed and oral

arguments heard on this appeal. (See Appendix C.) The questions thereby arising are:

(1) Whether the arbitrary and retroactive application of the New Mexico Supreme Court order violates the Due Process Clause of the Fourteenth Amendment in that it deprived petitioner of the type of appeal guaranteed by the State Constitution and statute.

(2) Whether affirmance of a lower court judgment without an opinion deprives petitioner of the Equal Protection of the laws in contravention of the Fourteenth Amendment, in that similarly situated litigants are provided with differing types and degrees of appellate review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of New Mexico, Article VI, Section 2 provides:

> "Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; *provided that an aggrieved party shall have an absolute right to one appeal.* (As amended September 28, 1965)." (Emphasis added)

New Mexico Statutes Annotated, 16-7-11 (1953 Comp.), provides, in pertinent part:

> "Three [3] judges of the court of appeals constitute a quorum for the transaction of business, but not more than three [3] judges shall sit in any matter on appeal. *Decisions of the court shall be in writing with the grounds stated,* and the result shall be concurred in by at least two [2] judges . . ." (Emphasis added)

New Mexico Supreme Court Order #8000 Misc. "In The Matter Of The Docket Of The Court Of Appeals" is found at Appendix C, *infra,* p. 18.

STATEMENT

Plaintiffs-respondents brought suit to recover damages for personal injuries sustained in an automobile accident which occurred on October 8, 1970. near Aztec, New Mexico. A jury returned a verdict for the Plaintiffs-respondents in the amount of $25,500.00. Defendant-petitioner brought an appeal based on four errors which occurred at trial and which were preserved for review. The four asserted errors involved substantial, distinct points of law. No one of the points questioned the sufficiency of the evidence to support the verdict.

The grounds of error asserted in the appeal were:

(1) Deciding that the Defendant was liable because the negligence of another was implied to him as a matter of law, thus denying Petitioner a jury trial on this issue.

(2) Granting a directed verdict on the issues of negligence, contributory negligence, and proximate cause, thus denying Petitioner of a jury trial on these issues.

(3) Highly inflammatory final argument of Respondents' attorney in violation of New Mexico law.

(4) The allowance of a measure of damages and instructions thereon which allowed a double recovery in violation of New Mexico law dealing with loss of earnings and impairment of earning capacity.

Briefs were filed by both parties and oral arguments heard by the Court of Appeals of the State of New Mexico on June 11, 1974.

On October 3, 1974, the New Mexico Supreme Court issued Order #8000 Misc. which provided that the Court of Appeals could review its caseload--

> ". . . for the purpose of determining whether a case should be decided by an order of affirmance without an opinion, by memorandum opinion of reversal, or should be scheduled for disposition by formal opinion without oral argument."

Pursuant to this order, the Court of Appeals affirmed the lower court judgement without an opinion on November 6, 1974 (Appendix A).

Defendant-petitioner then sought a writ of certiorari in the State Supreme Court, which petition was denied on December 13, 1974, without comment (Appendix B).

As regards the raising of the Federal question in the State proceedings, this case is similar to *Burns v. Ohio*, 360 U.S. 252, 3 L. ed. 2d 1209, 79 S. Ct. 1164, in that the Federal issues arise from the denial by the State courts of the appellate review sought by the petitioner. In such a case there is little opportunity to have the State appellate courts pass upon the issue, for it is their action, or lack thereof, which is sought to be reviewed. As this Court has often noted, the general rule as to raising the Federal question does not apply where the grounds of the State appellate court decision supply a new and unexpected basis for a claim by the petitioner of the denial of a Federal right. *Missouri ex rel Missouri Insurance Comp. v. Gehner*, 281 U.S. 313, 74 L. ed. 870, 50 S. Ct. 326; *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 74 L. ed. 1107 (1929); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 77 L. ed. 360 (1932); *Cole v. State of Arkansas*, 333 U.S. 196, 92 L. ed. 645 (1948).

When the facts of this case are examined, it becomes clear that the petition for certiorari in the State's highest court

amounted to a request for that court to review its own order (#8000 Misc.) on Constitutional grounds, and particularly, to review the application of that order to the case at bar. The denial of the petition for certiorari by the New Mexico Supreme Court effectively foreclosed any opportunity petitioner had to have the State courts pass on the Federal issues involved in this controversy. In such a case, the only review available is from the United States Supreme Court. (See Appendix D wherein the pertinent portions of the petition for certiorari in the State court are set out.)

REASONS FOR GRANTING THE WRIT

1. The order of affirmance handed down by the New Mexico Court of Appeals without an opinion is in conflict with a series of cases recently decided by the United States Supreme Court, including: *Lindsay v. Normet,* 405 U.S. 56, 31 L. ed. 2d 36, 92 S. Ct. 862 and *Rinaldi v. Yeager,.* 384 U.S. 305, 16 L. ed. 2d 577, 86 S. Ct. 1497 (1966).

The crux of these recent holdings, as stated in *Lindsay v. Normet, supra,* is that:

> "When an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."

Such is the situation in the case at bar. In New Mexico, not only is an appeal "afforded," it is guaranteed by a State Constitutional provision. Petitioner contends that the summary disposition of appeals without opinions amounts to a denial of this Constitutional right. The practical effect is to turn the guaranteed right to an appeal into something analagous to a petition for certiorari.

This practice of affirming without writing an opinion is also in direct conflict with a State statute (16-7-11 N.M.S.A., 1953 Comp.) which requires that decisions of the Court of Appeals be in writing, with the grounds stated for the holding. No

question has been raised as the the power of the legislature to enact laws on this matter.

The function of appellate opinions is set out in the oft-cited case of *N. L. R. B. v. Amalgamated Clothing Workers of America, AFL-CIO*, 430 F. 2d 966 (1970), where the Fifth Circuit's rule on summary disposition of appeals was explained.

> "Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law--and particularly Judge-made law, grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like."

See also the discussion in *Sarty v. Forney*, 509 P. 2d 535 (Ore. App. 1973).

In reading the above-cited discussion from *N. L. R. B. v. Amalgamated Clothing Workers, supra,* it is important to note that that appeal, unlike the case at bar, merely questioned the sufficiency of the evidence to support an administrative decision. In a case such as *N.L.R.B. v. Amalgamated Clothing Workers, supra,* the appellate court is merely asked to review the record to see if the facts support the decision rendered below.[1] There are no "pure" issues of law involved in such an appeal, so an extended discussion may not be necessary to explain the basis of the appellate decision. But in a case such

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[1]Footnote 1 to the court's opinion in **N.L.R.B. v. Amalgamated Clothing Workers, supra,** stated:

> "The instant case is a run-of-the-mill Board order finding that the Union had violated Sec. 8 (b) (1) (A) of the Act . . ."

as the one at bar, where several substantive law are raised, an affirmance without an opinion is of no precedential value, and certainly does not answer the issues raised by the appellants. The practice of affirming without opinions leads all too easily to decision avoidance, as was foreseen by Chief Judge Brown in the *Amalgamated Clothing Workers* case cited above:

> "The Court recognizes that it must--the word is must--never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues."

It seems incongruous that appellate courts, which have insisted that lower courts and administrative agencies state the reasons for their decisions, are now trying to exempt themselves from that same responsibility.

The Equal Protection Clause is violated by the order in that all litigants are not treated similarly in New Mexico as regards this Constitutionally guaranteed right to an appeal. A reading of the court order indicates that appellees will benefit from far more than the usual advantages that flow to the litigant who succeeds in the lower court. For under the new court order an order of affirmance may be handed down without opinion or comment, whereas a reversal requires an opinion with a statement of reasons and authorities. This type of distinction bears no relation to the merits of the individual appeal, and its practical effect may well be the summary affirmance of a large number of meritorious appeals. As the U. S. Supreme Court noted in *Rinaldi v. Yeager, supra:*

> "This court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

In the case at bar, the distinction between those who are provided with full appellate review and those whose appeals are summarily resolved by affirmance without an opinion is

arbitrary and unreasonable in that the appellate court need not even set out the factors which are relied upon to deny this petitioner the full review theoretically guaranteed by the Constitution and statutes of New Mexico. When equal access to the appellate court is denied upon unstated grounds, then a certain class of litigants is arbitrarily deprived of a right to an appeal--a right which is given to all by law, but to less than all, in reality.

A further equal protection issue arises in that the New Mexico Supreme Court order is temporary and is intended to be in effect only until rules revising criminal appellate procedure are adopted and in effect. The order, thus, treats litigants differently solely on the basis of the timing of the appeal. Litigants who appealed cases prior to the issuance of this order were afforded full appellate review. And those who appeal cases after this temporary order loses force will apparently be provided with opinions setting out the grounds for the decision. It is only the appeals currently before the New Mexico Court of Appeals which are being disposed of summarily. Those cases which were in the Court of Appeals at the time the order was issued are singled out for unequal treatment by a mandate to the Court of Appeals. This type of distinction bears no relation to the merits of the particular appeal, and thus leads to different treatment of appeals on arbitrary grounds.

In essence, then, the petitioner asks that a writ issue to review the order of the New Mexico Court of Appeals, because such a summary affirmance is in conflict with recent holdings of the U.S. Supreme Court and denies certain litigants the equal protection of the law.

2. The arbitrary and retroactive application of New Mexico Supreme Court order #8000 Misc. requires close scrutiny by this Court to determine if there exists a violation of petitioner's due process rights.

This case was tried before a jury and judgment was entered on March 8, 1973. Notice of appeal was filed with the New Mexico Court of Appeals on April 27, 1973. Briefs were submitted and the points of appeal argued by both sides on June 11, 1974. After all these steps had taken place, and the parties awaited the Court of Appeals decision, the New Mexico Supreme Court came out with an order on October 3, 1974, allowing for affirmance without an opinion. The Court of Appeals cited this directive, and affirmed the judgment of the trial court without opinion or explanation on November 6, 1974.

Legislation having a retroactive application must be carefully scrutinized if the Constitutionality of the law is questioned. *Prata Undertaking Company v. State Board of Embalming*, 55 R.I. 454, 182 A. 808, 104 A.L.R. 389. In the case at bar, the order of the New Mexico Supreme Court can be treated as such legislation. See *Lathrop v. Donohue*, 367 U.S. 820, 6 L. ed. 2d 1191, 81 S. Ct. 1826 and *Williams v. Bruffy*, 96 U.S. 176, 24 L. ed. 716.

A detailed examination of the New Mexico Supreme Court order is necessary in order to clearly reveal the lack of due process and inequality prohibited by the U. S. Constitution. First, the order establishes as a motivating factor the disposition of numbers of cases. Its spirit and effect is a moratorium in essence on appeals to the New Mexico Court of Appeals until other efforts can become effective. The order cites a "current backlog" and says that the disposition of this current backlog "should be expedited." (See order at Appendix C.) The mere emphasis upon disposition of numbers of appeals in a mandatory order to the judges of the Court of Appeals, to interrupt the usual attention and study that they would normally apply to the review of the cases before them, in itself interferes with the ordinary and due process of appellate proceedings.

We now examine this order in its various categories wherein so-called "guidelines" were laid down. It is immediately apparent that to reverse a case an opinion must be issued and it is required in the order that the opinion "shall identify the issue on which the case is reversed and shall cite authority for the reversal." That portion of the order therefore, is merely a reiteration of the statute which requires a written opinion by the Court of Appeals. But appellants are treated unequally because the statute is set aside insofar as they are concerned but confirmed insofar as an appellee is concerned. We submit that for the New Mexico Supreme Court to enter the appellate picture at a time when petitioner's case had been argued and submitted, and to order the court and panel that heard the case to review the case with the idea of expediting all of the cases before it, is to place an emphasis upon a solution which would require the least time and effort. The whole thrust of the order is directed toward an affirmance since affirmance is made much simpler and swifter than a reversal.

We now examine what we submit are illogical and improper standards when "an order of affirmance may be entered." Five categories are listed in the order authorizing "affirmance without opinion." It would appear that the term "issues presented" is intended to apply to an appeal where all points fit within a single category. The unreality of such a situation requires an examination of the issues presented in our particular appeal. They cannot all possibly fit within any one of the five categories and there is no way in an order of affirmance to tell which issue presented fits within any one of the five categories. Therefore, the so-called "guidelines" are so vague as to violate due process.

The fifth category says that an order of affirmance may be entered where the issues presented "are manifestly without

merit." Does that mean that an order of affirmance can be entered if all the issues presented fit within that category? In addition, what would be the basis for determining whether all the issues "are manifestly without merit"? That would appear to be a category that would approximate the situation where the appeal on its face has absolutely no merit. But when an opinion is not rendered this category becomes so subjective and so much an authoritarian and arbitrary principle as to justify any mandate. We submit that an examination of the points raised in appeal together with the transcript of the trial court shows that this category could not in any sense of the term fit this appeal.

When we examine this appeal in light of subdivision (d) which says that an order of affirmance may be entered where the issues presented "involve asserted errors which were not prejudicial to the complaining party" and examine the appellate points, we can readily see that this subdivision could not possibly be the basis for an order of affirmance on any of the four points raised for appeal. For instance, a directed verdict on the issue of family purpose doctrine which was an asserted error is absolutely prejudicial to the appellant. We, therefore, submit that two of the five categories used as "guidelines" cannot possibly apply.

Two other categories listed as (b) and (c) cannot possibly apply since a statute or rule of the Supreme Court is not involved in any one of the four points of appeal. And subdivision (b) applies only to the substantial evidence rule to support the verdict which was not involved in our case at all.

That leaves subdivision (a) which says that an order without an opinion can be entered where the issues presented "have been previously decided by the Supreme Court or the Court of Appeals." It is hard, if not impossible, to fit any of the points of appeal into that subdivision. Subdivision (a), as are all of the subdivisions, is so vague, general, and uncertain in its meaning, as to violate Constitutional standards. The issues

raised by appeal are simply not in our jurisprudence either by the Supreme Court or the Court of Appeals. They involve application of principles of law to existing facts. There is no appellate court judgment on the issues raised by the appeal.

We submit that the order itself contains improper, inconsistent, unequal, vague "guidelines" promulgated for the purpose of disposing of numbers of cases with a mandate from one court to a reviewing court to dispose of a "backlog" at the expense of normal appellate procedures guaranteed by the Constitution of the State of New Mexico and a mandatory opinion statute.

The basis of this point is that vague guidelines, set out in a mandatory order to the Court of Appeals, were used to deprive petitioner of a due process appeal in the State courts.

3. The United States Supreme Court should review this case because the appellate procedures used represent an unreasonable method of coping with an increasing appellate caseload.

Appellate courts, Federal and State, throughout the United States are experimenting with various procedures for managing growing caseloads. The danger exists that in striving for solutions to pragmatic problems, the appellate courts will destroy the rights created by the Constitutions and laws of the United States and of the individual States.

The discussion by Chief Judge Brown in *N. L. R. B. v. Amalgamated Clothing Workers of America, AFL-CIO, supra,* remains the most commonly cited analysis of the interplay between practical problems and appellants' rights. But in New Mexico the attempts have already gone far beyond the approach outlined in the *Amalgamated Clothing Workers* case, so that now the result is to deny certain litigants the right to a meaningful appeal, all in the name of judicial economy.

The New Mexico Supreme Court has completely set aside an act of the legislature in violation of the separation of

powers doctrine. The pretext or reason for this action was an asserted backlog of cases on appeal. No substantiating reasons are provided, and the only basis is the observation of the New Mexico Supreme Court that such a backlog exists. If a State Supreme Court can do away with statutes in this manner, then an alarming infringement upon statutorily-created rights exists. The difficulty with such ex parte action by judicial bodies is that no opportunity is given for a hearing to determine the necessity for such drastic remedies. Nor is there an opportunity for a discussion of alternative solutions. This order represents a judicial usurpation of a legislative function.

Cases from various jurisdictions present a broad spectrum of approaches to the problem of managing an increasing appellate caseload. Several of these cases point out an important aspect of the problem--that there is a limit to the streamlining of appellate procedure which may justifiably be used to solve the problems presented by growing caseloads.

For example, in *Alexander v. City of Detroit*, 392 Mich. 30, 219 N.W. 2d 41 (1974), the Court of Appeals rendered an opinion in which no authorities were cited and no excerpts from the record set out. In specfically disapproving of such skeleton opinions, the Supreme Court of Michigan stated:

> "We recognize the tremendous burdens of the Court of Appeals' ever-increasing docket. Nonetheless, we will not lend our imprimatur to the use of appellate opinions which do not hew to the established practice in Michigan of informing the parties, the Bench, and the Bar of the precise grounds for decision of the legal questions in the controversy."

Similar discussions are found in these cases: *Florida Hotel and Restaurant Commission v. Dowler*, 99 So. 2d 852 (Fla. 1958); *Lumbermen's Underwriting Alliance v. American Excelsior Corp.*, 33 Ohio St. 2d 37, 294 N.E. 2d 224; *People v. Medina*, 99 Cal. Rptr. 630, 492 P. 2d 686 (1972); *United States v. Costa*, 356 F. Supp. 606 (D.C. Cir. 1973).

Cases such as these point out the substantial public interest involved in this petition for certiorari. As more and more attempts are made to summarily dispose of appeals, the necessity of a Constitutional framework for these attempts becomes more critical.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO HERBERT R. TSOSIE and EDITH TSOSIE,

Plaintiffs-Appellees

v. NO. 1388

W. C. WHITNEY and JOHN DOE, personal representative and administrator of the estate of DAVID E. WHITNEY, deceased,

Defendants-Appellants

APPEAL FROM THE DISTRICT COURT
OF SAN JUAN COUNTY
Musgrove, Judge

THOMAS J. HYNES
CATON & HYNES
Farmington, New Mexico Attorneys for Plaintiffs-Appellees

EUGENE E. KLECAN
KLECAN & ROACH, P.A.
Albuquerque, New Mexico Attorneys for Defendants-Appellants

ORDER

Plaintiffs recovered judgment in an action arising out of an automobile collision and defendants appeal. After oral argument and review of the record and briefs, the judgment is affirmed. This Order is pursuant to Supreme Court Order No. 8000 Misc., dated October 3, 1974.

WILLIAM R. HENDLEY
JUDGE

WE CONCUR:

/s/ LEWIS R. SUTIN J.

/s/ RAMON LOPEZ J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO — Friday, December 13, 1974

NO. 10253

W. C. WHITNEY and JOHN DOE, personal representative and administrator of the estate of DAVID E. WHITNEY, Deceased,

Petitioners,

vs. **Original Proceedings on Certiorari**

HERBERT R. TSOSIE and EDITH TSOSIE,

Respondents.

This matter coming on for consideration by the Court upon petition for writ of certiorari directed to the Court of Appeals, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 1388 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

ADVANCE OPINIONS OF THE SUPREME COURT OF NEW MEXICO

The following opinions were issued by the Court October 11, 1974.

The headnotes given are completely unofficial and are not authorized for citation or reference as stating the official position of the Supreme Court.

IN THE MATTER OF THE DOCKET OF THE COURT OF APPEALS — 8000 Misc.

ORDER

The Supreme Court having met with Judges of the Court of Appeals,

It appearing that the Court of Appeals has a backlog of both cases submitted and cases ready for submission, and that the number of cases filed in the Court of Appeals has increased substantially and will continue to increase,

It appearing that efforts are being made to provide solutions for management of the Court of Appeals caseload, those efforts being a Supreme Court committee studying ways to revise criminal appellate procedure and a request to the Legislature for funding a Prehearing Division in the Court of Appeals; it also appearing that these proposed solutions cannot go into effect for some months in the future,

It further appearing that disposition of the current backlog in the Court of Appeals should be expedited and that this Court should provide guidelines for expediting disposition of the current backlog.

NOW, THEREFORE, in the exercise of our superintending control, IT IS ORDERED:

1. Cases in the Court of Appeals previously submitted for

decision, scheduled for submission, or ready for submission, shall be reviewed as provided herein.

2. The review shall be for the purpose of determining whether a case should be decided by an order of affirmance without an opinion, by memorandum opinion of reversal, or should be scheduled for disposition by formal opinion without oral argument.

3. Cases in the Court of Appeals presently submitted and scheduled for submission in October, 1974 shall be reviewed by the panel of judges assigned to the case. This review shall be completed within the near future. The review decision shall be by majority vote of the panel.

4. Cases in the Court of Appeals ready for submission, but not yet scheduled, shall be reviewed by the chief and senior judges of the Court. This review shall be begun in the immediate future. A review decision requires agreement of the two judges.

5. If a majority decision cannot be reached upon a panel review under Paragraph 3, or if the chief and senior disagree upon a review under paragraph 4, the case in which the disagreement exists shall be scheduled for submission after oral argument.

6. After review, an order of affirmance may be entered where the issues presented:

(a) have been previously decided by the Supreme Court or the Court of Appeals;

(b) assert an absence of substantial evidence to support the verdict or judgment, and substantial evidence exists;

(c) are answered by statute or rule of the Supreme Court (whether the rule be of criminal procedure, civil procedure, appellate procedure or of evidence);

(d) involve asserted errors which were not prejudicial to the complaining party;

(e) are manifestly without merit.

7. After review, a memorandum opinion of reversal may be entered where the issues presented:

(a) have been previously decided by the Supreme Court or the Court of Appeals;

(b) asserts an absence of substantial evidence to support the verdict or judgment, and no substantial evidence exists;

(c) involve asserted errors, which under applicable law were prejudicial to the complaining party.

Any memorandum opinion of reversal shall identify the issue on which the case is reversed and shall cite authority for the reversal.

8. This order supersedes appellate rules which conflict with this order.

9. This order is temporary and is intended to be in effect until rules revising criminal appellate procedure are adopted and in effect. This order applies to all cases presently filed in the Court of Appeals and all cases filed in that Court while this order is in effect.

10. The Clerk of the Supreme Court shall cause this order to be published in the State Bar Bulletin for two consecutive weeks.

s/JOHN B. McMANUS, JR.
Chief Justice

s/LA FEL E. OMAN
Justice

s/DONNAN STEPHENSON
Justice

s/SAMUEL Z. MONTOYA
Justice

s/JOE L. MARTINEZ
Justice

APPENDIX D

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

The appellants-petitioners, W. C. Whitney and John Doe, make this application for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, pursuant to Rule 29 of the New Mexico Supreme Court Rules.

The case involves a claim for personal injuries resulting from an automobile accident which occurred near Farmington, New Mexico on October 8, 1970. The petitioners seek a review of the Court of Appeals affirmance of the verdict for the plaintiffs-appellees.

A. DATE OF DECISION:

The Court of Appeals entered an order on November 6, 1974, affirming the judgment of the trial court. The affirmance was not accompanied by any opinion, pursuant to Supreme Court Order No. 8000 Misc., dated October 3, 1974.

B. QUESTIONS PRESENTED FOR REVIEW:

In the briefs and oral arguments presented to the Court of Appeals, the appellants-petitioners urged four points of appeal. Since the Court of Appeals affirmance does not indicate any basis for the decision, these same four points will be set out in this Writ, as petitioners have no way of knowing the grounds for the Court of Appeals' decision. In addition, the fifth question presented involves the use of the affirmance without an opinion, which petitioners argue is unconstitutional in that it may be used to effectively deprive parties of their right to an appeal.

5. Petitioners pray that a Writ of Certiorari be issued in this case because the Court of Appeals' Order affirming the judgment without an opinion, deprives the petitioners of the right to an appeal, Article VI, Section 2 of the New Mexico

Constitution. See *State v. Watson,* 82 NM 769, 487 P2d 197 (1971).

The right to an appeal has been held to include the right to oral arguments and the right to a written opinion. *People v. Medina,* 99 Cal. Aptr. 630, 492 P2d 686 (1972).

In New Mexico, the Legislature has declared that the Court of Appeals must provide a written opinion, and indicate the grounds for the decision. (16-7-11, N.M.S.A. 1953) This statute reads in pertinent part:

> "Decisions of the court shall be in writing with the grounds stated, and the result shall be concurred in by at least two (2) judges."

Thus Supreme Court Rule 8000, Misc., allowing for judgment to be affirmed without opinion is in direct conflict with 16-7-11 N.M.S.A., 1953, and deprives petitioners of one of the basic elements of the right to an appeal--namely, a written opinion setting forth the grounds for the decision.

It is significant that in Supreme Court Rule 8000, Misc., there is the statement that:

> "8: This order supersedes appellate rules which conflict with this order."

But 16-7-11, N.M.S.A., 1953, is *not* an appellate rule of procedure, it is a legislative enactment setting forth the duties of the Court of Appeals. The Court of Appeals affirmance in this case violates the statute. The question presented is whether a Supreme Court Rule aimed at solving pragmatic problems posed by a case backlog can override the statutorily defined duties of the Court of Appeals.

Many other jurisdictions have dealt with the increasing appellate caseloads. In an oft-cited case from the federal courts, *National Labor Relations Board v. Amalgamated Clothing Workers of America,* 430 F2d 966 (1970) a new rule of appellate procedure for the Fifth Circuit, was enunciated, allowing for affirmance without an opinion. But the cautionary language of that opinion should be considered:

"A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement on these articulated reasons is the thing out of which the law -- and particularly -- Judge -- made law -- grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability or the like.

The Court recognizes that it must -- the word is must -- never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues."

In asking the Supreme Court to issue a Writ of Certiorari, petitioners urge that the factors set forth in the above cited opinion *(National Labor Relations Board v. Amalgamated Clothing Workers of America,* supra) be considered. These factors include:

1. The necessity of written opinions as a check on possible arbitrary appellate decisions,

2. The utility of written opinions in developing case law, and

3. The danger that affirmance without an opinion will be used to avoid difficult appellate decisions.

The position of petitioners is stronger than that in *National Labor Relations Board v. Amalgamated Clothing Workers of America,* supra, because the New Mexico statute requires a written opinion. The same legislature that created the Court of Appeals required a written opinion with reasons for the decision. The order in this case violates that statute. Certiorari should be issued to review the decision.

E. The first four questions presented here are identical to the questions raised in the Court of Appeals. Reference to the entire briefs is appropriate. The Fifth question does not appear in the briefs since it is predicated on the actions of the Court of Appeals, after the briefs were submitted.

Respectfully submitted,

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APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NO. 1388

MANDATE

THE STATE OF NEW MEXICO TO THE DISTRICT COURT Sitting within and for the County of San Jaun, GREETINGS:

WHEREAS, In a certain cause lately pending before you numbered 17,755 on your civil docket, wherein HERBERT R. TSOSIE and EDITH TSOSIE were plaintiffs and W. C. WHITNEY and JOHN DOE, personal representative and administrator of the estate of DAVID E. WHITNEY, deceased, were defendants, by your consideration in that behalf, judgment was entered for plaintiffs; and

WHEREAS, Said cause and judgment were afterwards brought into our Court of Appeals for review by defendants by appeal, whereupon such proceedings were had that on November 6, 1974, an order was handed down affirming your judgment aforesaid;

NOW, THEREFORE, This cause is hereby remanded to you for such further proceedings therein as may be proper consistent and in conformity with said order and the judgment of this Court.

WITNESS, The Honorable Joe W. Wood, Chief Judge of the Court of Appeals of the State of New Mexico and the Seal of said Court this 16th day of December, 1974.

(SEAL) (s) Hazel M. Davis

cc: Counsel

ATTEST: A true copy.

Clerk of the Court of Appeals
of the State of New Mexico.

APPENDIX F

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

HERBERT & EDITH TSOSIE,

Plaintiffs,

vs. NO. 17755

W. C. WHITNEY and JOHN DOE, Personal Representative and Administrator of the Estate of DAVID E. WHITNEY, Deceased,

Defendants.

JUDGMENT

This case came on for trial before a jury by the plaintiffs, Herbert Tsosie and Edith Tsosie, and against W. C. Whitney, defendant, and only against W. C. Whitney, defendant. It was also agreed that the correct initials of the defendant were C. W. Whitney rather than W. C. Whitney, as was stated in the caption. The parties presented testimony before the jury, the Court instructed the jury, arguments of counsel were made and the jury returned a verdict in favor of the plaintiff, Edith Tsosie, and against the defendant, C. W. Whitney, in the sum of $5,500.00. The jury returned with the verdict in favor of plaintiff, Herbert Tsosie, and against the defendant, C. W. Whitney, in the sum of $20,000.00.

IT IS, THEREFORE, ORDERED AND ADJUDGED AND DECREED that in conformity with said verdict, that the plaintiff, Edith Tsosie, recover from and of the defendant, C. W. Whitney, in the sum of $5,500.00 plus costs and that the plaintiff, Herbert Tsosie, recover from and of the defendant, C. W. Whitney, in the sum of $20,000.00 plus costs.

To all of which the defendant, C. W. Whitney, objects and excepts.

DISTRICT JUDGE

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